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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARQUEL TREMAIN ROBINSON, Defendant and Appellant.	A155151 (Marin County Super. Ct. No. SC202087)

A jury convicted defendant Marquel Robinson of one count of forcible rape, and the trial court sentenced him to eight years in prison.[1] On appeal, he claims that the court abused its discretion by (1) excluding, under Evidence Code section 352 (section 352), some of the evidence he offered to impeach the victim's testimony and (2) imposing the upper term. Neither contention is persuasive, and we affirm.

I.
FACTS

On the night of July 9, 2017, 59-year-old Jane Doe traveled to Marin City by bus to watch a musical performance at a church. She brought her bicycle with her, but its chain fell off on her way from the bus stop to the church. After the performance, she spent some time collecting cans and bottles from a dumpster.

As she walked her bicycle back to the bus stop, she encountered 32-year-old Robinson and another man, who also had a bicycle. She asked them for help replacing her chain, and Robinson approached while the other man left on his bicycle. Robinson

[1] Robinson was convicted under Penal Code section 261, subdivision (a)(2).

asked her "if [she] wanted to have some fun," and she pointed at the dumpster and responded, "I just had fun at the recycle." Robinson then picked up her bicycle and walked down an alley. Doe testified that "he went off into the darkness around a corner, and then he came back, and he said, 'This wouldn't be good,' and so then he was going to take [her] onto the baseball field, he said." Believing that he was looking for a well-lit place so he could fix her bicycle, she followed him.

As Doe and Robinson reached the field, a police car drove by them. Robinson "[j]ump[ed] over in the darkness," saying "he didn't want to get hassled by the police." Doe followed Robinson to a dark area by the fence, where they discovered that the gate to the field was locked. She "knelt" down to find her cigarettes in her purse, and Robinson "put his hand on [her] back" so that she "couldn't get back up again."

Doe was wearing a dress, and she felt Robinson insert his penis into her vagina. She asked him what he was doing and if he had a condom, because she was concerned that she would get a sexually transmitted disease. Then, she began pleading for him to stop, saying, "It hurts. It hurts. Please don't do this to me." Robinson "kept hammering" her, however, until he finished and ran away. The parties stipulated that DNA matching Robinson's profile was later found in Doe's vaginal area.

Doe chased Robinson, but she soon lost him. As she was standing in a parking lot, a Marin County sheriff's car approached. She asked the sheriff's deputy for help, explaining that she had just been raped. The deputy testified that Doe "was scared, nervous, visually shaken up by the incident." Doe showed the deputy where the rape had occurred, and he observed glasses on the ground and pieces of candy from her purse "strewn about."

The defense case centered on attacking Doe's credibility by focusing on a 2010 incident during which Doe claimed to have been sexually assaulted. According to Doe, she was waiting for a friend outside an apartment building when she felt "[s]omebody put their hand between [her] legs from behind and start[] squeezing [her vaginal area] and then start[] pulling on [her] hands." She looked back and saw someone wearing a hooded sweatshirt. When she pulled the hood back, she saw a man she did not recognize. He ran

away, and she chased him. When she caught up to him, there were police nearby, and she reported what had happened.

The man Doe accused in the 2010 incident denied sexually assaulting her. According to him, Doe asked him for money and cigarettes. He told her he did not have either, but she kept talking to him as he tried to leave. Doe grabbed him by the hair and asked why he was ignoring her, and he told her not to touch him. He pushed her away, and she began screaming.

II.
DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion by Excluding Evidence Offered to Impeach Doe's Testimony.

Robinson contends that the trial court erred by excluding evidence of a 1995 incident bearing on Doe's credibility. We are not persuaded.

1. Additional facts.

Before trial, the People orally moved to exclude evidence of the 1995 incident, during which, as described by Robinson's counsel, a law enforcement officer found Doe in a vehicle containing drugs, drug paraphernalia, a prescription pad, and a stolen credit card. Although Doe initially told the officer that none of the items were hers, she eventually admitted otherwise. Defense counsel, who had just received the report about the incident and was attempting to locate the officer, argued that the evidence was admissible to impeach Doe's testimony because lying to the police and possessing stolen property are "certainly moral turpitude."

After confirming with the prosecutor that "between 1995 and 2010," the date of the prior reported sexual assault, Doe had "no history of acts of moral turpitude," the trial court excluded evidence of the 1995 incident. It explained,

> "I have already admitted into evidence I think probably the strongest evidence there could be about someone's credibility in a sexual assault case, and that is that there has been a prior false report of sexual assault.

> "This incident from 1995 seems so long ago to me, and such a long period of time with no acts of moral turpitude, that under . . . [s]ection 352, I'm going to deem it inadmissible.
>
> "It sounds like there may be some moral turpitude related stuff there, but the prejudicial impact, the undue consumption of time, and just the little relevance it has from 23 years ago, causes the Court to feel that a [section] 352 calculation leads to the conclusion that it should be excluded from evidence, so it's going to be excluded."

2. Discussion.

As the parties agree, a witness's past conduct involving moral turpitude is generally relevant and admissible to impeach the witness's testimony. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295–296; see also *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 ["victim's credibility is almost always at issue in sexual assault cases"].) "The admission of past conduct involving moral turpitude to impeach a witness in a criminal trial is subject to the trial court's discretion under . . . section 352" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091–1092), which authorizes courts to exclude "evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) We review the trial court's evidentiary ruling for an abuse of discretion, which exists only if the ruling " 'exceed[s] the bounds of reason, all of the circumstances being considered.' " (*Feaster*, at p. 1092.)

Initially, Robinson contends that because "the prosecutor made no specific objection" under section 352, "the [trial] court should not have taken it on itself to come up with a reason to exclude the evidence." Robinson does not actually argue for reversal on this basis, however, and he provides no authority to suggest that a court asked to rule on the admissibility of certain evidence cannot sua sponte exercise its discretion to exclude it under section 352.

Robinson also challenges the bases the trial court gave for excluding evidence of the 1995 incident: remoteness, undue prejudice, and undue consumption of time. "When

the witness subject to impeachment is not the defendant," the most significant factors under section 352 are "whether the conviction [or prior conduct] (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) Here, Doe's prior conduct occurred 23 years before trial, which "certainly meets any reasonable threshold of remoteness." (*People v. Burns* (1987) 189 Cal.App.3d 734, 738; see *People v. Harris* (1998) 60 Cal.App.4th 727, 739 ["Although there is no bright-line rule, 23 years is a long time"].) The court was entitled to exclude the evidence on this ground alone.

Even aside from its remoteness, the 1995 incident was of limited probative value. As the trial court observed, evidence that Doe may have falsely reported a prior sexual assault was already before the jury. Thus, evidence of significantly different dishonest conduct would have added little, especially compared to the amount of time presenting it would consume. Robinson claims that admitting the evidence "would [not] have taken much trial time at all," because it would take "a minute" to determine whether Doe admitted to the prior misconduct and testimony from the law enforcement officer "might have taken fifteen minutes." We agree with the Attorney General that Robinson's "time estimate is pure speculation" and fails to account for potential delay from permitting defense counsel to investigate the incident, of which he had just learned. In short, the court did not err by excluding the evidence at issue.

B. The Trial Court Properly Imposed the Upper Term for Rape.

Robinson also claims that a remand for resentencing is required because the record did not support any of the aggravating factors on which the trial court relied to impose the upper term for the conviction. We disagree.

1. Additional facts.

Robinson submitted several letters from family and friends attesting to his good character, and his sentencing memorandum requested the lower term of three years. The probation report recommended that the trial court impose the midterm of six years, identifying the violence of the rape as an aggravating factor and Robinson's "fairly minor" criminal record as a mitigating factor. Finally, the prosecutor argued at sentencing that the court should impose the upper term of eight years.

The trial court concluded that the upper term was appropriate after balancing one mitigating factor, Robinson's previous successful performance on probation, against four aggravating factors. First, the offense "involved a high degree of cruelty, viciousness, and callousness" because it involved "snatching a woman off the streets of our community and raping her in an alley." Second, Doe was a particularly vulnerable victim, because she was alone and Robinson "tricked [her] into believing he was going to help her and then he . . . raped her instead of helping her." Third, Robinson had engaged in violent conduct that was a danger to society, because "[h]ow could it be concluded otherwise that the defendant having raped a woman is anything other than a danger to society." And finally, Robinson's convictions were of "increasing seriousness," progressing from misdemeanors to felonies to a violent felony.[2]

2. Discussion.

The determination whether to impose the lower, middle, or upper term for an offense "rest[s] within the sound discretion of the [trial] court," which must select the term that "best serves the interests of justice." (Pen. Code, § 1170, subd. (b).) In making this determination, the court "may consider circumstances in aggravation or mitigation . . . and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b).[3]) A single aggravating factor can justify the decision to impose the upper term (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371), although an aggravating factor cannot be an element of the crime. (Rule 4.420(d).) We review the choice of the upper term for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Robinson claims there is no evidence to support the trial court's finding that the offense "involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" under

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[2] The trial court also found that Robinson's conditional sentence in another case at the time he raped Doe "probably qualifie[d] as a factor in aggravation," although it stated it was "not putting a whole bunch of weight on it."

[3] All further rule references are to the California Rules of Court.

rule 4.421(a)(1), because "every rape will inherently present some degree of violence, cruelty, etc." and his crime was "not more vicious and callous than 'ordinary' rape." Here, however, the trial court focused on the fact that Robinson "snatch[ed] a woman off the street[] . . . and rap[ed] her in an alley." In other words, the court relied on Robinson's intentional isolation of an unsuspecting victim to accomplish the rape, not the violence of the rape itself, to conclude that the crime was especially cruel and callous. This did not amount to reliance on an element of rape as an aggravating factor. (See *People v. Wilson* (2008) 44 Cal.4th 758, 812–813 [defendant's attempts to isolate rape victim could support imposition of upper term].)

If any doubt remained, there was also sufficient evidence to support the related aggravating factor that "[t]he victim was particularly vulnerable" under rule 4.421(a)(3). For purposes of this factor, " ' "[p]articularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." ' " (*People v. DeHoyos* (2013) 57 Cal.4th 79, 154.) Robinson argues that no evidence supported this factor, because he and Doe "were strangers" and no "particular characteristic of their relationship or her circumstance" prompted her to follow him. It is true that a preexisting relationship between a defendant and a victim may support a finding of particular vulnerability, as in the sole case Robinson cites. (*People v. Clark* (1990) 50 Cal.3d 583, 638 [defendant relied on prior relationship with and knowledge of rape victim "to persuade her to admit him into her apartment"].) But it is hardly the case that such a relationship is *required* to support the victim's vulnerability as an aggravating factor. Here, Doe—nearly 30 years older than Robinson and described as "petite"—was alone after dark when she sought Robinson's help to fix her bicycle, and he lured her into another area to rape her. We have no trouble concluding that there was sufficient evidence to support the court's determination that she was particularly vulnerable.

In short, there was sufficient evidence to support the findings that the rape was especially cruel and callous and that Doe was particularly vulnerable. As a result, the

trial court did not abuse its discretion by imposing the upper term for the crime, and we need not address whether the other two aggravating factors were properly found.

III.
DISPOSITION

The judgment is affirmed.

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Humes, P.J.

WE CONCUR:

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Banke, J.

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Sanchez, J.

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